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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

MINORITY COMMUNICATIONS, INC.,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred in ruling the Federal Communications Commission acted within its discretion in dismissing Petitioner's application for a radio station license renewal for lack of candor, allowing one man to destroy the station's prospects for renewal and ignoring Petitioner's overwhelmingly positive contributions to the largely minority population it serves.[1]

---

[1] *Center for Study and Application of Black Economic Development v. F.C.C.*, United States Court of Appeals for the District of Columbia No. 96-1071, was consolidated in the D.C. Circuit with *Iowa Acorn Broadcasting Corporation v. F.C.C.*, No. 96-1066. Center for Study and Application of Black Economic Development, hereafter "Center," and Minority Communications, Inc., were intervenors in Case No. 96-1066, and Minority Communications, Inc., was an intervenor in Case No. 96-1071.

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OPINIONS BELOW

The October 22, 1997 Judgment of the United States Court of Appeals for the District of Columbia Circuit affirming orders of the Federal Communications Commission is contained in Appendix A.

The Decision of the Federal Communications Commission is contained in Appendix B.

The Order of the United States Court of Appeals for the District of Columbia Circuit denying Petitioner's Petition for Rehearing is contained in Appendix C.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit filed Judgment October 22, 1997. The Court denied Rehearing December 16, 1997.

Jurisdiction of the F.C.C. was pursuant to Title 47 U.S.C. Section 309, authorizing the Commission to regulate radio stations. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was pursuant to Title 47 U.S.C. Section 402(b), authorizing the United States Court of Appeals for the District of Columbia to review a decision of the Commission denying renewal of a station license. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Jurisdiction of the F.C.C. was pursuant to Title 47 U.S.C. Section 309, authorizing the Commission to regulate radio stations. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was pursuant to Title 47 U.S.C. Section 402(b), authorizing the United States Court of Appeals for the District of Columbia to review a decision of the Commission denying renewal of a station license.

Procedural History: On January 31, 1990, Center filed an application with the F.C.C. for renewal of its license of Station KUCB-FM at Des Moines. (Application). Mutually exclusive applications for construction permits for a new FM station on the channel occupied by Center were filed by Acorn and Minority, necessitating a comparative hearing. Following hearing before Administrative Law Judge Richard Sippel, Center's and Acorn's applications were denied, and Minority's was granted. (Initial Decision, F.C.C. 93D-07, released March 26, 1993). Exceptions to the Initial Decision were filed by all parties, and on March 17, 1995, the F.C.C. Review Board released a final Decision affirming Judge Sippel's findings, and denying Center's and Acorn's applications and granting Minority's. (Decision, F.C.C. 95R-01, released March 17, 1995). Center filed a Petition for Reconsideration, which was denied by the Review Board June 7, 1995. (Memorandum Opinion and Order, F.C.C. 95R-12, released June 7, 1995). Center subsequently filed, with the full Commission, an Application for Review of the Review Board's Denial of Reconsideration. The Commission denied Center's Application February 2, 1996. (Order, F.C.C. 96-32, released February 2, 1996). Center filed timely Notice of Appeal to the United

States Court of Appeals for the District of Columbia Circuit February 29, 1996. (Notice). The Court affirmed by Judgment rendered October 22, 1997, and denied Center's Petition for Rehearing December 16, 1997.

Facts material to consideration of the question presented: Center was granted a permit by the F.C.C. for a 10-watt, educational station at Des Moines, Iowa, on February 26, 1979. On January 31, 1990, Center filed an application for renewal of its license of Station KUCB-FM. (Application). Minority and Acorn both filed applications for construction permits for a noncommercial, educational FM station at Des Moines during this same period. Because Acorn and Minority proposed to operate on the channel now occupied by Center, the applications were mutually exclusive, necessitating a comparative hearing.

Question 6 of Center's renewal application asked whether any adverse finding had been made against "the applicant or any of its parties" in any "criminal proceeding" involving "any felony" since the filing of its last major application. (Application). Center responded "no." (Id.) Center's President, Charles Knox, signed the application "Jamal Young," for Center's Vice President. (Id.) The Commission subsequently learned that Mr. Knox had been convicted in 1987 in the United States District Court for the Western District of Texas of two felony counts, and in 1989 in Illinois Federal Court on three counts, one involving embezzlement of federal funds intended for KUCB. (Decision, F.C.C. 95R-01, released March 17, 1995, p. 3). As a result, the Commission specified a basic qualifying issue: to determine whether Center misrepresented material facts to, and/or concealed material facts from,

the Commission in connection with its answer to Question 6. (Id.)

On October 3, 1991, Administrative Law Judge Richard Sippel released an Order stating an evidentiary admissions session was to convene February 25, 1992. (Order, F.C.C. 91M-3002, released October 3, 1992). The Order did not indicate that counsel would be required to be physically present for the hearing. (Id.) Center served a summary of witnesses' testimony and a list of exhibits intended for introduction prior to the hearing. (Tr. 240-44, 258; Center's Summary of Witnesses' Testimony, February 11, 1992; Memorandum Opinion and Order, F.C.C. 92M-264, released February 28, 1992, p. 3). Center had no objections to make to exhibits to be presented by Mass Media Bureau Lawyers. On February 25, 1992, an evidentiary admissions session was conducted. Counsel for Center did not physically appear at the admissions session, but rather called Judge Sippel's office at commencement of the hearing to be hooked into the hearing by speaker phone. (Tr., February 25, 1992, pp. 160-161). All prior hearings, except one, had been conducted by speaker phone (and the Order setting that October 1, 1991, hearing specifically noted counsel were to appear in the court room (Amended Prehearing Conference Order, F.C.C. 91M-2650, released August 28, 1991)). Judge Sippel's secretary advised Counsel, at Judge Sippel's request, that the conference was not set up to be conducted by speaker phone and that Counsel would not be allowed to participate by speaker phone. (Id.) Judge Sippel declined Counsel's request to return his call on the basis that any ex parte communication would be improper. (Id.) Had Counsel for Center known that Judge Sippel expected

physical presence at the hearing, Counsel would have requested leave to participate telephonically, since Center had no funds to fly Counsel to Washington, D.C. (Center's Petition for Reconsideration, April 14, 1995, p. 5, par. 16). Center's counsel, representing Center on a pro bono basis, was denied access to the hearing.

Center was declared to be in default as a result of its failure to physically attend the February 25, 1992, hearing, and was thereafter precluded from presenting a direct case. (Tr., February 25, 1992, pp. 238-239; Memorandum Opinion and Order, F.C.C. 92M-264, released February 28, 1992). Judge Sippel altered the order of proof for the hearing so that Center would participate in the third position behind Acorn and Minority for the limited purpose of offering rebuttal argument only. (Memorandum Opinion and Order, F.C.C. 92M-264, released February 28, 1992). Judge Sippel also restricted cross examination of witnesses to material not brought up in written testimony and material directly mentioning Center. (Tr., August 10, 1992, pp. 480-481). The burden was assigned Center to produce past KUCB President, Dr. Charles Knox, to answer allegations referenced against him in the Hearing Designation Order. (Id.) A motion for reconsideration was considered and denied. (Memorandum Opinion and Order, F.C.C. 92M-282, released March 6, 1992).

On March 3, 1992, Center filed a Motion for Disqualification of Presiding Officer, which was denied by the Presiding Judge. (Memorandum Opinion and Order, F.C.C. 92M-288, issued March 4, 1992). Center filed an appeal on March 5, 1992, and, in accordance with F.C.C. procedures, the Presiding Judge certified the question to the Review Board and stayed further litigation of the case

pending action by the Review Board. (Order, F.C.C. 92M-298, released March 9, 1992). The hearing set to commence March 10, 1992, was canceled. (Id.) The Review Board affirmed the ruling of the Presiding Judge on his qualification to hear the case. (Review Board Memorandum Opinion and Order, F.C.C. 92R-39, adopted May 8, 1992, and reported at 7 F.C.C. Rcd 3101 (Review Bd. 1992)).

Stay was lifted May 14, 1992, and the parties were ordered to appear for a conference June 3, 1992. (Order, F.C.C. 92M-567, released May 15, 1992). At the request of Minority for a continuance due to a court conflict, the prehearing conference was reset for and held on June 17, 1992. (Order, F.C.C. 92M-574, released May 19, 1992).

A series of interlocutory rulings in response to motions filed by Center were made after the stay was lifted, denying Center's motion for leave to proceed *in forma pauperis* (Memorandum Opinion and Order, F.C.C. 92M-602, released May 26, 1992); denying Center's motion for change of venue to Des Moines (Memorandum Opinion and Order, F.C.C. 92M-603, released May 27, 1992); renewing denial of Center's right to cross-examine based on its waiver for failure to appear at the admissions session (Memorandum Opinion and Order, F.C.C. 92M-608, released May 27, 1992); denying Center's motion to offer the testimony of Charles Knox *via* speaker phone (Memorandum Opinion and Order, F.C.C. 92M-613, released May 28, 1992); denying Center's motion for continuance because mooted by stay pending appeal (Memorandum Opinion and Order, F.C.C. 92M-639, released June 3, 1992); denying Center's motion to enlarge issues based on adverse procedural rulings of

the Presiding Judge inferring racial bias (Memorandum Opinion and Order, F.C.C. 92M-643, released June 3, 1992); and denying as moot a request by Center to participate in the prehearing conference by telephone (Order, F.C.C. 92M-660, released June 11, 1992, clarified by Order, F.C.C. 92M-661, released June 11, 1992 (further clarifying that Center was authorized to participate in the June 17, 1992, prehearing conference *via* speaker phone)). Virtually every pleading filed by Center after February 25, 1992, was denied.

Prior to the June 17, 1992, prehearing conference, the parties submitted calendars for the purpose of setting a hearing date. A universal availability for August 10, 1992, was reflected. At the prehearing conference, the Presiding Judge forthwith set that date for the commencement of hearings. (Order, F.C.C. 92-M-692, released June 19, 1992). After the Presiding Judge announced the August 10 hearing date from the bench, counsel for Center immediately objected, noting he had a trial conflict that arose after he submitted his agenda. (Tr., June 17, 1992, pp. 315, 319-323, 396-399). Center suggested that hearing dates be set in early 1993. (Id.) Center's request was denied. (Id.) A formalized ruling subsequently issued, setting the hearing for August 10, 1992. (Memorandum Opinion and Order, F.C.C. 92M-696, released June 22, 1992). On June 30, 1992, Center filed a written Application For Continuance of Hearing Date (Application, June 30, 1992), which was also denied. (Memorandum Opinion and Order, F.C.C. 92M-779, released July 15, 1992). Center's subsequent Application for Recess of Hearing was additionally denied. (Memorandum Opinion and Order, F.C.C. 92M-822, released July 30, 1992). Center again alleged

Judge Sippel was biased and its motion was again denied at the trial and appellate level. (Memorandum Opinion and Order, F.C.C. 92M-823, released July 30, 1992, aff'd, Memorandum Opinion and Order, F.C.C. 92R-68, adopted August 5, 1992, reported at 7 F.C.C. Rcd 5192 (Review Bd 1992)).

Hearings were held August 10, 11, 12 and 13, 1992. His request for a continuance having been denied, Counsel for Center was forced to send an associate to the first day of hearings. (Tr., August 10, 1992, p. 422). After the hearings, the record was closed. (Tr. 1479). The parties filed Proposed Findings of Fact and Conclusions of Law October 16, 1992, with replies filed November 6, 1992. (Order, F.C.C. 92M-883, released August 18, 1992).

On March 26, 1993, the F.C.C. released Judge Richard Sippel's Initial Decision, denying renewal of Center's license of Station KUCB-FM, denying Acorn's construction permit application and granting Minority's construction permit application for a new FM Station at Des Moines. (Initial Decision, F.C.C. 93D-07, released March 26, 1993). Center was disqualified for "intentional misrepresentation" of material facts in its renewal application, false testimony "given in open court" at the hearing, and taking Station KUCB-FM off the air for two years without Commission knowledge or authorization. Acorn was disqualified for being financially unqualified. Center and Acorn filed Exceptions to the Initial Decision and Minority filed a reply to the Exceptions.

The Initial Decision was reviewed by an F.C.C. Review Board consisting of Chairman Joseph A. Marino and Board Member Marjorie Reed Greene. The decisional

issues presented were: (a) whether Center lacks the requisite character qualifications because it did not satisfy the high standard of candor required of a broadcast licensee; and (b) whether Acorn has failed to establish that it is financially qualified to construct and operate a new FM station. The Review Board issued a final Decision affirming the Administrative Law Judge's findings, denying Center's license renewal application and Acorn's construction permit, and granting Minority's application for a new station. (Decision, F.C.C. 95R-01, released March 17, 1995).

Center filed a Petition for Reconsideration and Acorn filed an Application for Review. Minority filed an Opposition to both. The Review Board denied Center reconsideration. (Memorandum Opinion and Order, F.C.C. 95R-12, released June 7, 1995). Center subsequently filed, with the full Commission, an Application for Review of the Review Board's Denial of Reconsideration. The Commission denied Center's and Acorn's Applications for Review. (Order, F.C.C. 96-32, released February 2, 1996).

Center filed timely Notice of Appeal in this court February 29, 1996. (Notice). Minority filed for intervention. Acorn also filed Notice of Appeal, and Center was granted intervention in Acorn's appeal. The F.C.C. filed for and was granted consolidation of the two cases, No. 96-1066 and 96-1072. (Order, March 31, 1997). The United States Court of Appeals for the District of Columbia affirmed the orders under review October 22, 1997. (Decision, October 22, 1997). Petition for Rehearing was denied December 16, 1997. (Order, December 16, 1997).

ARGUMENT

I. THE REVIEW BOARD'S DECISION IS CONTRARY TO COMMISSION POLICY, ARBITRARY AND CAPRICIOUS.

In her Statement annexed to the Review Board's final Decision (F.C.C. 95R-01, released March 17, 1995), Board Member Marjorie Reed Greene appropriately laments Charles Knox's association with Center:

> Center clearly has been badly served by Knox. Center's members trusted him, relied on him, revered him. *See* Saadiq, tr. 1304, 1325. In return, Knox embezzled funds Center badly needed, let KUCB and Center members participate in fund-raising for his defense, and may well have avoided disclosing the reasons for his persecution to Center members.

(Id., p. 15). Center *was* badly served, not once, but twice. First by Knox and last by the Commission, which denied Center its renewal based on the wrongdoing of one malfeasant, with no consideration for the whole of Center's members – members consisting overwhelmingly of honest, hardworking individuals whose sole purpose in operating their small station is to improve the quality of the lives of their largely poor, minority listeners through educational programming. As a small, minority-owned and operated, non-profit, educational station, KUCB is one of its kind. And, while it admittedly has, in the past, had difficulty adhering to the letter of the volumes of F.C.C. regulations with which it must comply (without resources for technical assistance), KUCB has on the whole operated in good faith, as suggested by Greene,

and should not be punished for acts outside of its knowledge or, thereby, control. While the Review Board concluded from the testimony at hearing that Center members Long and Samad may have had knowledge of Knox's convictions, there is no indication that that knowledge was widespread or that any other members of Center's Board shared that knowledge. The Commission has focused so narrowly in this case on the bad acts of a man no longer associated with Center, and on who knew what and when they knew it, that it has lost sight entirely of the vital nature of Center's mission, as well as its own charge to support such missions. It has focused entirely on the bad fortune that plagued Center in the late 1980s, and ignored the virtually uninterrupted period of quality programming that has followed.

The Commission's denial of Center's license renewal is contrary to its own policies supporting minority-owned, educational stations. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978). Congress and the F.C.C. indicated that minority ownership was a significant way of including minority view points in the area of programming. The advantages of minority programming include: a public interest in diversity of controls of limited resources, serving minority needs by enriching and educating, granting free speech for all under the First Amendment, and assuring equal opportunity. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979 (1978). Judge Sippel's insensitivity to the conditions under which Center operates – its listenership consists of persons who are predominantly poor and often unemployed – is evident in his denial of KUCB's motion for

leave to proceed *in forma pauperis* (Memorandum Opinion and Order, F.C.C. 92M-602, released May 26, 1992) (App. p. 177), his insistence Center's counsel appear in Washington, D.C., and his expectation that Center, without ability to hire technical assistance, comply to the letter with the Commission's complex rules and regulations. To on the one hand deny *in forma pauperis* status and on the other expect Center to comply with the myriad of complex Commission rules is fundamentally unfair and virtually precludes continued operation of such stations. Judge Sippel's lack of concern for the public impact of this minority station is exemplified in his ruling precluding public witnesses from presenting testimony:

> MS. LADEN: . . . . But, in the past there has been a lot of latitude given to public witnesses. . . .
>
> * * *
>
> MS. LADEN: And for the most part people have been allowed to testify.
>
> JUDGE SIPPEL: This is not going to be that kind of a proceeding where people are going [to] just come in and say what they want to say.
>
> * * *
>
> MS LADEN: . . . . But , to a certain extent, I think it needs to be said that they may have a right, if their testimony is relevant and they have a right to present it.
>
> JUDGE SIPPEL: Well, as I said, they certainly have a right to be here. But, I don't know what kind of a procedure that you would have in mind as to how we would screen this type of

testimony, how we would – I don't know anything that comes close to giving any kind of adequate notice to the other parties, except to hear it articulated in open court. And taking the time to do that, when we are concerned about time, just doesn't make any sense.

* * *

JUDGE SIPPEL: Well, people might be coming and they may be observing, but they are not going to hear much testimony from Center based on this ruling today. So, I don't know what [sic] there is going to be much to talk about from so called public witnesses.

* * *

JUDGE SIPPEL: Well, if you do get further calls about this as we get closer to the trial date, it certainly would be appropriate for you to tell them that the Judge has made a ruling and he has excluded witness testimony from Center because of a default on their part, so that in all probability there is no point in considering any further public testimony in this case.

* * *

MS LADEN: Your Honor, I am just asking for clarification. If Center's testimony has been excluded because they failed to exchange sworn written testimony, does that automatically exclude the witnesses, I mean, the public witness testimony that I have in mind is not sponsored by Center. It is people who are coming forward of their own volition.

JUDGE SIPPEL: But without any notification, they just walk in the courtroom and say they want to talk on the record.

> MS. LADEN: Such testimony has been heard in the past, I understand. . . .
>
> JUDGE SIPPEL: . . . . We are just not going to go down that road and get into public interest testimony because it is virtually, they aren't putting anybody on.

(Tr., February 25, 1992, pp. 247-253). It is arbitrary and capricious for an agency to fail to take into consideration all relevant factors in making a determination. *National Black Media Coalition v. F.C.C.*, 791 F.2d 1016 (2nd Cir. 1986) (citations omitted). Public opinion is unquestionably such a factor.

II. THE REVIEW BOARD'S FINDINGS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

An applicant for a broadcast license will be disqualified for misrepresentation only upon substantial evidence of misrepresentation. *David Ortiz Radio Corp. v. F.C.C.*, 941 F.2d 1253, 291 U.S.App.D.C. 336 (C.A.D.C. 1991). Carelessness, without intent or motive to mislead, should not be grounds for disqualification. *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983). *See also Washington Association for Television and Children v. F.C.C.*, 665 F.2d 1264, 1270 (D.C.Cir. 1981) (the standard applied by the Commission in cases involving misrepresentations on the part of applicants for licenses is one of intent). Negligence and inattentiveness are not disqualifying. 5 F.C.C. RCD. N. 13, p. 3860 (1990), quoting from *Metro Broadcasting, Inc.*, 57 R.R.2d 440, 445-446 (Rev. Bd. 1984). *See also In Re Application of John C. Roach*, 433 F.C.C.2d 685 (1973) (Commission held evidence of carelessness of

exaggeration, puffing and slipshoddiness in representation made to the Commission fell short of the degree of culpability warranting an inference of willfulness and wantonness); *Weyburn Broadcasting Ltd. Partnership v. F.C.C.*, 984 F.2d 1220 (C.A.D.C. 1993), 299 U.S.App.D.C. 382, rehearing denied (#91-1378) (Commission should have enlarged issues in license application hearing to determine whether applicant was guilty of misrepresentation or lack of candor; fact that stock certificates declared that they had been paid for when in fact they had not, together with applicant's conflicting stories raised genuine issue concerning whether applicant's stories were purposeful misrepresentations as opposed to memory lapses).

The Review Board's findings of misrepresentation by Center as a whole are unsupported by substantial evidence in the record. While Center was naive and clearly remiss in relying on Charles Knox to complete its application for renewal, and in failing to obtain proper advice in that regard, its shortfalls were the product of ignorance, lack of funds to hire technical assistance, and carelessness – Center as a whole had no intent to mislead the Commission.

Judge Sippel failed to consider mitigating factors in the alleged incident of misrepresentation. Center was staffed by members of the community, none of whom had a great deal of education. (Center's Petition for Reconsideration, p. 11-12, par. 44). Center's errors should not be lumped in the category of those made by commercial stations with extensive funds for technical experts and

media attorneys to guide them through complex Commission procedure. See *Janus Broadcasting Company*, 788 F.C.C.2d 788, 791-793 (1980).

Center's meritorious broadcast record for the four years preceding the Board's decision should have been considered by the Board as mitigating any serious violations. In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1231-32 (1989), the Commission indicated that the fundamental purpose of the character inquiry about an applicant's qualifications is "to make a predictive judgment relating to the applicant's propensity to deal honestly with the Commission and to comply with its rules and policies." The Board should have considered that once Center's Board of Directors learned of Knox's convictions, after KUCB's renewal application was filed in 1990, the Board moved to accept Mr. Knox's resignation. (Decision, F.C.C. 95R-01, released March 17, 1995, p. 2).

III. THE BOARD'S RULING REGARDING THE FEBRUARY 25, 1992, HEARING MATERIALLY PREJUDICED CENTER.

The Board concluded Center was not materially prejudiced by Judge Sippel's ruling finding Center in default for failing to attend the February 25, 1992, hearing. But as a result of Judge Sippel's ruling, Center was denied the opportunity to present its case at the admissions session and final hearing. Center was thereby denied the process due it prior to denial of its license renewal.

Although not a precise concept, renewal expectancies of a commercial television station licensee are a natural

aspect of the public interest inquiry in a comparative licensing hearing. See *Central Florida Enterprises, Inc. v. F.C.C.*, 598 F.2d 37, 194 U.S.App.D.C. 118 (1978), cert. dismissed, 99 S.Ct. 2189, 441 U.S. 957, 60 L.Ed.2d 1062. By shifting the order of appearances at the hearing, Judge Sippel denied Center its renewal expectancy. (See Tr. p. 249, Sippel, "[t]hey don't have a renewal expectancy case"). Center was relegated to last place and the burden shifted to it to show why it should keep its license, as opposed to the burden being borne by Acorn and Minority to show why Center should lose its license. Judge Sippel had other punitive actions available to him. For instance, he could have sanctioned Center's counsel for missing the February 25 hearing.

The comparative hearing process is unfair to the incumbent even assuming a renewal expectancy. The incumbent's past performance is compared to the challenger's guarantees of future performance, which allows challengers to tailor their proposals to the necessary criteria. *27 St. Louis U.L.J. 95* (1983). Without an expectancy, the process places an unreasonable burden on the incumbent, which must beat the empty promises of challengers, as here, with an actual performance record.

IV. THE REVIEW BOARD'S FAILURE TO DISQUALIFY JUDGE SIPPEL BASED ON BIAS AGAINST CENTER RESULTED IN PREJUDICIAL ERROR.

In an adjudicatory proceeding, recusal is required where "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of the particular case in advance of

hearing it." *Metropolitan Council of NAACP Branches v. F.C.C.*, No. 93-1471, Slip Op. p. 18 (D.C. Cir. January 27, 1995). Judge Sippel, through his rulings and demeanor, demonstrated a systematic and consistent hostility against Center in pre-hearing proceedings and in hearing, from which the only conclusion is that he in some measure adjudged this case in advance of fully hearing it.

While the Commission has authority to impose strict procedural rules to cope with the number of applications for radio licenses it receives, the quid pro quo for stringent acceptability criteria is *explicit* notice of those rules. *Glaser v. F.C.C.*, 20 F.3d 1184, 305 U.S.App.D.C. 320 (C.A.D.C. 1994). Center received no such notice it was expected to physically attend the February 25, 1992, hearing, but was severely punished by Judge Sippel for failing to attend when he changed the order of the hearing. Center never recovered from the animosity the incident generated against it from Judge Sippel.

Following filing by Center March 3, 1992, of its Motion for Disqualification of Presiding Officer, based on Judge Sippel's sanctions against Center for failure to attend the February 25, 1992, admissions session, and appeal of Judge Sippel's denial of that Motion, Judge Sippel denied virtually all of Center's motions. See, for example, orders denying Center's motion for leave to proceed *in forma pauperis* (Memorandum Opinion and Order, F.C.C. 92M-602, released May 26, 1992); denying Center's motion for change of venue to Des Moines (Memorandum Opinion and Order, F.C.C. 92M-603, released May 27, 1992); renewing denial of Center's right to cross-examine based on its waiver for failure to appear at the admissions session (Memorandum Opinion and

Order, F.C.C. 92M-608, released May 27, 1992); denying Center's motion to offer the testimony of Charles Knox *via* speaker phone (Memorandum Opinion and Order, F.C.C. 92M-613, released May 28, 1992); denying Center's motion for continuance because mooted by stay pending appeal (Memorandum Opinion and Order, F.C.C. 92M-639, released June 3, 1992); denying Center's motion to enlarge issues based on adverse procedural rulings of the Presiding Judge inferring racial bias (Memorandum Opinion and Order, F.C.C. 92M-643, released June 3, 1992). Both the sanctions imposed on Center directly for failure to attend the admissions session – sanctions for the most part imposed *at* the admissions session prior even to seeking an explanation from Center – and Judge Sippel's rulings against Center following its requests for recusal, demonstrate Judge Sippel had pre-judged the case.

At the February 25, 1992, admissions hearing, Minority objected to a written request by Center to cross-examine two of Minority's principal witnesses. (H.T., February 25, 1992, pp. 89-90). The request was filed a day late and Minority complained that Center failed to show relevance of the requested cross-examination. (Id.) Judge Sippel sustained the objection and ruled Center would not be allowed to cross the witnesses. (H.T., February 25, pp. 94, 96). Acorn also failed to show relevance in its request to cross the same witnesses. (Id., at 91-92). Judge Sippel ruled in this instance that Acorn *would* be allowed to cross the witnesses (Id., at 93-94, 95), noting that this was an "educational case," evidently as grounds for lowering the standard for *Acorn*.

At a March 5, 1992, hearing, Acorn complained it "was supposedly going to get a FAX of 75 pages" from Center, but had not received "a full record." (H.T., March 5, 1992, pp. 294-295). In fact, Counsel for Acorn called the office of Center's Counsel mid-FAX and, speaking to a secretary, requested his office "stop sending us S-H-I-T to my office." (H.T., March 5, 1992, p. 296). When Center set the record straight, Judge Sippel responded "Mr. Parrish, we really don't need that. I mean, that is a continuity that we really don't need." (Id.)

In *Innovative Women's Media Ass'n v. F.C.C.*, 16 F.3d 1287, 305 U.S.App.D.C. 76 (C.A.D.C. 1994), this court ruled that a license applicant's limited partner's failure to appear at deposition was the result of an honest misunderstanding between the applicant and its competitor's counsel, and that an applicant should not suffer dismissal for failure to prosecute unless, with contempt or inexcusable sloth, it plainly defies an order. While Center was not dismissed for its failure to attend the February 25, 1992, hearing, it was nonetheless punished – it lost its expectancy – for its honest misunderstanding. Judge Sippel's haste to impair Center in a circumstance where no explicit order even existed for Center to have defied, is indicative of his bias against Center. Judge Sippel's ruling relegating Center to last in order was arbitrary and capricious where Judge Sippel failed to give clear notice of attendance requirements and particularly when past hearings had been conducted telephonically. *See Satellite Broadcasting Co., Inc. v. F.C.C.*, 824 F.2d 1, 262 U.S.App.D.C. 274 (C.A.D.C. 1987) (rule did not specify location at which applications were to be filed, and it was reasonable for applicant's counsel to file in Washington).

Judge Sippel's animosity toward Center was also evident in his refusal to continue the August 10, 1992, hearing date. (Memorandum Opinion and Order, F.C.C. 92M-822, released July 30, 1992). Center's Counsel advised Judge Sippel that his trial schedule precluded his attendance the first day of the hearing and requested a continuance (Tr., June 17, 1992, pp. 404-421; Application for Continuance, June 24, 1992; Supplement to Application for Continuance, July 6, 1992; Interlocutory Appeal of Denial of Continuance, July 24, 1992). Judge Sippel, in his Order, suggested as one solution to Counsel's scheduling conflict that Center might appear at the hearing *pro se* – a suggestion demonstrating Judge Sippel's total disregard for protecting Center's interests in the proceeding (Memorandum Opinion and Order, F.C.C. 92M-822, released July 30, 1992, p. 2, par. 5). Because Judge Sippel denied Center's request for a continuance, Counsel was forced to send an inexperienced associate to the first day of hearings – someone unfamiliar with the complexities of Center's case. (Tr., August 10, 1992, p. 422). Lead Counsel was denied, through rejection of his requests for continuance, the opportunity to cross examine and recross examine three witnesses. (Tr. August 10, 1992, p. 424).

It is clear from the record that Judge Sippel had adjudged facts and law in this case in advance of hearing it, and as early as February 25, 1992.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests the Court reverse the decision of the United States Court of Appeals for the District of Columbia Circuit affirming denial of Petitioner's renewal application and granting Minority a construction permit.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1066 September Term, 1997

Iowa Acorn Broadcasting Corporation,

Appellant

v.

Federal Communications Commission,

Appellee

And Consolidated Case No. 96-1072

Appeal from Orders of the
Federal Communications Commission

Before: SILBERMAN, RANDOLPH, and GARLAND, *Circuit Judges*

JUDGMENT

(Filed Oct. 22, 1997)

(Mandate 12/24/97)

These causes came to be heard on the records compiled before the Federal Communications Commission, and were briefed and argued by counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. *See* D.C. Cir. R. 36(b) (January 1, 1994). On consideration thereof, it is

ORDERED and **ADJUDGED**, by this Court, that the orders under review are hereby affirmed. Iowa Acorn argues that holding it to a commercial standard of financial qualification violates the FCC's policy of applying more lenient financial qualification criteria to all noncommercial applicants. The FCC, however, has not interpreted its policy that broadly. It is true that the FCC relaxes its financial criteria for noncommercial applicants relying on grants for funding. *See, e.g., KQED, Inc.*, 3 F.C.C.R. 2601 (Rev. Bd. 1988). Until now, however, the FCC had never addressed the question whether the relaxed standard applies to noncommercial applicants relying on loans. Whether or not the FCC adequately articulated its distinction between grants and loans in this case, Iowa Acorn could not show that it was financially qualified. Both grants and loans require funds, and Iowa Acorn could identify no investors.

With regard to the Center for Study and Application of Black Economic Development, we emphasize that the FCC is authorized to dismiss an application for lack of candor. While it is unfortunate that Charles Knox destroyed the Center's prospects of renewal, the dishonesty of one may disqualify the whole. *See FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). It is

FURTHER ORDERED by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41(a)(1) (January 1, 1994). This instruction to the Clerk is without prejudice to the

right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court:

/s/ Mark J. Langer
Mark J. Langer, Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-204

In re Applications of

CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT	File No. BPED-900131UA
For Renewal of License of Station KUCB-FM Des Moines, Iowa	
and	
IOWA ACORN BROADCASTING CORPORATION	File No. BPED-900102MB
MINORITY COMMUNICATIONS, INC.	File No. BPED-900116MA
For a Construction Permit for a New FM Station Des Moines, Iowa	

Appearances

Alfredo Parrish, Esq., and Elizabeth Kruidenier, Esq., for Center for Study and Application of Black Economic Development; *Steve Bachmann, Esq.*, for Iowa Acorn Broadcasting Corporation; *Mark E. Fields, Esq.*, for Minority Communications, Inc.; *Charles E. Dziedzic, Esq., Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.*, for the Chief, Mass Media Bureau.

DECISION

Adopted: February 27, 1995; Released: March 17, 1995

By the Review Board: MARINO (Chairman) and GREENE. Board Member GREENE issuing a Statement.

Board Chairman MARINO:

1. Following a trial-type hearing, Administrative Law Judge Richard L. Sippel (ALJ) granted the construction permit application of Minority Communications, Inc. (Minority) for a new noncommercial educational FM station at Des Moines, Iowa. *See Initial Decision*, 8 FCC Rcd 2116 (1993). The renewal application of Center for Study and Application of Black Economic Development (Center), licensee of noncommercial educational Station KUCB-FM, Des Moines, Iowa, and the application of Iowa Acorn Broadcasting Corporation (Acorn) were denied by the ALJ. Center was disqualified for "intentional misrepresentation" of material facts in its renewal application, false testimony "given in open court" at the hearing, and taking Station KUCB-FM off the air for two years without Commission knowledge or authorization. Acorn was disqualified for being financially unqualified. Exceptions to the *Initial Decision (I.D.)* have been filed by Center and Acorn challenging their respective disqualifications, and by Minority and the Mass Media Bureau urging additional grounds for Center's disqualification. Oral argument was not requested by any of the parties. The decisional issues presented on appeal are: (a) whether Center lacks the requisite character qualifications because it did not satisfy the high standard of candor required of a broadcast licensee, *see, e.g., Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1221-1223 (D.C. Cir. 1994); and,

(b) whether Acorn has failed to establish that it is financially qualified to construct and operate a new FM station, *see CHM Broadcasting Ltd. v. FCC*, 24 F.3d 1453, 1455, 1457 (D.C. Cir. 1994). Based on our own review of the factual record, in the light shed by the written arguments of the adversaries, we affirm the ALJ's denial of Center's license renewal and Acorn's application, and his grant of Minority's application for a new station.

CENTER'S CANDOR

2. *Background:* Center's renewal application and related ownership report were filed with the Commission on January 31, 1990. These documents appeared to the Commission to have been completed, signed, and filed by Jamal Long, who was listed as "Vice-President." *Hearing Designation Order (HDO)*, 6 FCC Rcd 4622, 4623 ¶ 12 (1991). Question 6 of Center's renewal application asked whether any adverse finding had been made against "the applicant or any of its parties" in any "criminal proceeding" involving "any felony" since the filing of its last major application. Despite the "no" response in Center's renewal application, the Commission recited, in its HDO at ¶ 12, that information had come to its attention that:

> Charles Knox, who is listed in the renewal application as the Center's 'President,' was convicted in 1987 in the United States District Court for the Western District of Texas of two felony counts. . . . Also, Knox was convicted in 198[9] in the United States District Court for the Northern District of Illinois of three felony counts. . . . None of these convictions was disclosed by the Center to the Commission.

Therefore, the Commission specified a basic qualifying issue:

> To determine whether [Center] misrepresented material facts to, and/or concealed material facts from, the Commission in connection with its answer to Question 6 of its instant license renewal application.

Id. at ¶ 16. After he had heard the evidence on this issue, the ALJ held first, that Center intentionally misrepresented when it responded to Question 6 in the renewal application, *I.D.*, ¶ 98; and, second, that this misconduct was aggravated when at the hearing Center's Vice-President and board member Jamal Long, and other witnesses, attempted to cover up incriminating circumstances. *Id.* at ¶¶ 53 and 103.

3. On the first point, the ALJ found it was undisputed that, before the renewal application was filed. Charles Knox had been convicted of several felonies in 1987 and 1989; that Charles Knox was identified as Center's President in the 1987, 1988, and 1990 ownership reports; that Knox prepared the 1990 renewal application, and the accompanying ownership report; and that Knox signed Jamal Long's name to those documents and mailed them to the FCC, *I.D.*, at ¶¶ 49-50, 55. From "the totality of the circumstantial evidence," the ALJ concluded that: "certainly Knox knew . . . he had multiple felony convictions that were required to be disclosed in Question 6" of the renewal application; and that "Long knew that Knox had the two felony convictions when Center prepared and filed its renewal application in January of 1990." *I.D.*, ¶ 98.

4. In his second major conclusion, the ALJ held that the "candorless testimony in open court" at the evidentiary hearing, taken together with Knox's misrepresentation in Question 6 of Center's renewal application, made this an even stronger case for denying license renewal. *Id.* at ¶ 103. He found: (a) "Long [a Center director and vice-president] had misrepresented that he had prepared the renewal application and that he had signed his name"; (b) "Long also attempted by his false testimony to create an appearance that Knox had withdrawn from his position as director and officer of Center" at the time of the 1990 renewal filings, and of the ownership reports of May 1987 and April 1988; (c) Knox "misrepresented in his testimony the status of his resignation in order to avoid an adverse finding against Center with respect to Knox's convictions"; (d) "Samad [a Center director and station manager] also testified falsely that the board of directors decided in 1989 to remove Knox"; and (e) "Long and Samad . . . testified falsely that they had no knowledge of Knox's convictions until after January 1990." *Id.* at ¶¶ 101-102. Accordingly, the ALJ held that (*id.* at ¶ 103):

> The fact that the misrepresentation in Question 6 was intentional rather than a rushed mistake is further established by the continuing misrepresentations in the testimony of Long and Knox. . . . An applicant may be disqualified on the basis of its principals' candorless testimony in open court and the issue need not be specifically designated as a hearing issue because "truth and candor are always in issue." *Old Time Religion Hour, Inc.*, 95 F.C.C.2d 713, 719 (Rev. Bd. 1983), citing *RKO General, Inc. v. F.C.C.*, 670 F.2d

215, 234 (D.C. Cir. 1981). Certainly the affirmative misrepresentation in the renewal application when considered with the additional misrepresentations of the principals at the hearing makes an even stronger case for denying Center's renewal.

5. *Center's Exceptions*. Center contends that the ALJ "improperly" resolved the misrepresentation issue because "there was nothing in the evidence presented which would indicate that [it] misrepresented material facts, and/or concealed material facts from the Commission." Center's Br. at 19. It disputes the ALJ's finding that its board members had knowledge of Knox's felony convictions when preparing the renewal application and argues that the ALJ misunderstood the record testimony concerning Knox's signing of Jamal Long's name on the renewal application. *Id.* at 19-20. Center asserts there was "absolutely nothing to be gained by including Dr. Knox's name on the application" and that the evidence shows "once the knowledge of the convictions of Dr. Knox became known [after his renewal application was filed in January of 1990], a prime objective was to openly accept the resignation of Knox and to exclude his name from any further actions taken by Center or KUCB. It was due to the lack of information regarding his convictions and the uncertainty of his capacity within the organization by some officers that erroneous information appeared in Center's application for renewal." *Id.* at 21. Both the Bureau and Minority support the ALJ's resolution of the misrepresentation and candor issues; they have filed exceptions urging additional grounds for Center's disqualification. Thus, the Bureau contends that the ALJ should also have disqualified Center on an ineptness

issue and the effects of Charles Knox's criminal convictions on Center's basic qualifications. Minority argues that Center should have also been disqualified on the unauthorized transfer of control issue. *See I.D.*, ¶ 2 for designated issues. We need not reach these exceptions because we have concluded that the ALJ's disqualification of Center on the more critical issue of candor is firmly supported by the record evidence and decisional.

6. Discussion: In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, 1231-32 (1989), the Commission indicated that the fundamental purpose of the character inquiry about an applicant's qualifications is "to make a predictive judgment relating to the applicant's propensity to deal honestly with the Commission and to comply with [its] rules and policies." *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985); KQED, Inc., 3 FCC Rcd 2821, 2826-27 at ¶¶ 24-25 (Rev. Bd. 1988) (denial of non-commercial license renewal for misrepresentations) (subsequent history omitted). Misrepresentations or omissions at hearing can, by themselves, result in disqualification. *See Swan Creek*, 39 F.3d at 1222, *quoting from Old Time Religion Hour, Inc.*, 95 FCC2d 713, 719 (Rev. Bd. 1983). Complete candor is essential. "If the Commission cannot believe and rely on what applicants and licensees tell it, it cannot maintain the integrity of its processes." *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571, 8573 (Rev. Bd. 1992), because of the Commission's exceedingly limited budget and staff compared with the enormous industries and thousands of licensees under its purview. *Id.* at 8573 n.7.

7. The Board has reviewed the record regarding Center's misrepresentation and lack of candor "in open

court" with special care and due deliberation, as requested by Center, *see* Center Br. at 26, and mandated by the Commission. *Nancy Naleszkiewicz*, FCC 95-33, at ¶ 4, released February 3, 1995. Our review was based primarily on Center's exceptions, its proposed findings of fact, its contemporaneous documents filed with the Commission during 1987-1990, and the testimony of Jamal Long, Charles Knox, and Ako Abdul-Samad. We have reached two separate and independent conclusions. First, we hold that substantial record evidence supports the ALJ's finding that Center's "no" response to Question 6 of the renewal application denying Knox's felony convictions was a misrepresentation. Second, and even more serious, is our conclusion that the record fully supports the ALJ's findings about a "cover up" and the giving of candorless testimony by Center's witnesses at the hearing. Thus, Center has breached the fundamental requirement that complete candor is demanded of "Commission licensees as to matters under investigation." *Grenco, Inc.*, 39 FCC2d 732, 736 (1973), cited with approval by the Commission and the court in *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1585 (1992), *aff'd by judgement*, 995 F.2d 306 (D.C. 1993); *Swan Creek*, 39 F.3d at 1222-1223 (applicant in testimony "acted less than honestly").

8. There is no dispute among the parties that Knox was convicted in 1987 in a Texas Federal District Court on two felony counts of impersonating an attorney in violation of Federal Law, and in 1989 in an Illinois Federal Court on three counts of conspiracy, racketeering, and embezzlement. Bureau Exhs. 15-18. The embezzlement

count involved funds from the National Telecommunications and Information Administration intended for Station KUCB-FM. Bureau Exh. 17 at 4-5. Defendant Knox's Plea Agreement recited that:

> the defendant on behalf of KUCB in Des Moines, Iowa received $72,484 from the Department of Commerce pursuant to a grant from the National Telecommunications and Information Administration (NTIA). As defendant knew and understood, the grant money was supposed to be used to purchase radio equipment to operate a minority-run radio station. Instead the defendant knowingly diverted at least $31,181.15 to a company called Burns Associates, South Chicago Auto Sales, for purposes other than radio equipment. The defendant completed this conversion of government funds by causing the $31,181.15 to be delivered to Burns and Associates in Chicago, Illinois. The money was delivered in the form of six checks signed by the defendant during the period from February, 1985 to March, 1986. Although quarterly reports of how the money was spent are required by NTIA. Knox never filed any such reports.

9. Center's ownership report dated January 22, 1990, which accompanied the renewal application, listed Charles Knox as Center's President, Bureau Exh. 12, at 4-5. Knox prepared this report, albeit signing Jamal Long's name and certification, and revised his address from earlier ownership reports, dated May 23, 1987, and April 12, 1988, which had also identified him as Center's President. Bureau Exh. 1 at 87-90. Knox testified that he had tendered a resignation by telephone in 1987, by letter in 1989, and had been asked to resign in 1989, when

Wayne Ford was elected President of the board of directors, allegedly in the winter of 1989, Tr. 1397-1398, 1416-1418. We agree with the ALJ that this testimony is not credible in light of Center's ownership documents filed with the Commission and Knox's admission on cross-examination that he had filled in the ownership form listing the names and addresses of the officers including his own. Tr. 1415-16. The alleged 1989 written resignation was never produced by Center, which was permitted by the ALJ to adduce all mitigating evidence, nor was Wayne Ford called to corroborate testimony that he was elected president in 1989 and then asked Knox to resign before the renewal filings. On March 15, 1990, Ford did file a fourth ownership report with the Commission which, for the first time, replaced Knox's name with Ford as President. Bureau Exh. 1 at 91-92. That report was certified by Ford on the 9th of March 1990, and further recited that: "All of the information furnished is reported as of February 10, 1990." *Id.* Late in his cross-examination, Knox conceded that: "It could have been 1990" [that the new Board was elected and he was asked to resign], "I am not sure," *see* Tr. 1417, and that, after the filing of Center's renewal application and his "resignation," he has travelled to Des Moines "a couple of times" and "was at the station" and that the KUCB Board continues to seek his advice "not necessarily on the operations, but on the technical portion." Tr. 1418.

10. Since Knox's ultimately admitted that he prepared Center's renewal application and ownership report, signed Long's name, and mailed them to the Commission from Chicago, we do not rely on the ALJ's finding, para. 4(e) above, that Long and Samad knew of

the convictions when the renewal application was filed, inasmuch as Long was not the individual who prepared or signed the application, and our *Decision* does not rest on that finding. Nevertheless, based upon Center's own documents, which were not adequately explained by Center's contradictory oral testimony, we conclude, as did the ALJ, that Knox was a party to the renewal application and ownership reports that he prepared and filed in January of 1990, and that Knox was aware of his own prior felony convictions. Thus, we will affirm the ALJ's initial conclusion that: "Knox, while acting as agent for Center, knowingly misrepresented when he checked . . . a 'No' response to Question 6. . . . The motive to so misrepresent was in order to knowingly conceal the fact of criminal convictions from the Commission which, if disclosed, would adversely reflect on Center's character." *I.D.*, ¶ 98.

11. Second, and fatal to Center's renewal application, is our affirmance of the ALJ's finding about the "cover up" by Center's witnesses, especially Long's failure to disclose Knox's role in the preparation of Center's renewal application and ownership report, and the other evasive and candorless testimony by the Center witnesses regarding the claim that Knox resigned or was asked to resign prior to the filing of the renewal application. Initially, we focus on Center's argument that the ALJ:

> misunderstood the testimony concerning who signed Jamal Long's name on Center's renewal application. . . . Jamal Long testified that the signature was his. However, he did not testify that he had personally signed his signature; in

> fact, both he and Charles Knox consistently testified that Charles Knox signed Long's name on the renewal application for 1990.

Center's Br. at 20-21.[1]

12. The record contradicts Center's contention, and supports the ALJ's findings. Our review of Long's testimony indicates that Long: (a) never revealed that Knox had prepared the renewal application, and related ownership report; (b) never indicated that Knox had signed Long's name; and (c) never indicated that Knox had mailed those documents to the Commission. On the contrary, in response to questions from Center's own counsel. Long testified "I filled out the application." Tr. 954, and answered "no" when asked if he had any significant contacts with Knox at the time the renewal application was prepared. Tr. 955. Long also testified that he "was trying to rush" because he "knew that the deadline was close" and that he made sure that the application was filed on time. *See* Tr. 956-957, reproduced below (emphases added):

> Q. Mr. Long, on that date [when the renewal application was signed], were you aware that Mr. Knox had a conviction of a felony crime, to your best recollection?
>
> A. No, I did not.

---

[1] The admission that Long did not sign his name, if it stood alone, would establish a technical violation of the Commission's signature rule, and require a remedial amendment. See KQED, 3 FCC Rcd at 2831-2832.

Q. Had you been in significant contact with Mr. Knox at that point at the time you filled out your application for renewal?

A. No.

Q. Tell us how did you know even to file a renewal of your license?

A. We had got a reply about the deadline and *I was trying* to rush to really get that in because *I knew* the deadline was coming close upon us. And that was *my concern, to make sure we got that in on time.*

Q. And did *you* do that?

A. Yes.

[CENTER'S COUNSEL]: Your Honor, I don't think I have any further questions at this time of this Witness.

13. On cross-examination, Long continued to deny that Knox had any involvement with Center at renewal time and did not disclose that Knox had prepared the renewal application and ownership report, signed Long's name, and filed them with the Commission. In his testimony, Long repeated over and over: "I sent the ownership report in"; "I sent it in"; "I got it in on time"; "I sent the form in"; "I didn't remove people"; "I didn't remove their names"; "I didn't take any names off"; "I didn't take any names off at that time"; "there was names I didn't take off." And, finally, when shown the signature on the report and asked if it was his, he replied "Yes," but failed to indicate that, in fact. Knox had signed his name. *See* Tr. 995-996 and 997, 998, 999 reproduced below (emphases added):

Q. Yes. Was Mr. Knox involved in Center as recently as January 1990?

A. No.

Q. Can you explain why this ownership report shows that Mr. Knox is President of Center in January 1990?

A. Lots of times when we sent – when *I sent the ownership report in*, we – in the times *I sent it in*, we didn't remove – *I didn't remove* people that had been – was no longer with the Center. *I didn't remove* their names, because when you do the ownership report, to add some people in, you always remove some people.

So these times *I did not take any names off*. That was because *I was in a hurry* to make sure that *I got them in on time*. And so *I didn't take any names off at that time*. They have a list, a column where you add names and you take names off.

* * *

Tr. 995-96.

Q. In other words, Mr. Knox was President of Center in 1990.

A. *I said when I sent the form in, there was names that I didn't remove.*

Q. Mr. Long, this ownership report that was signed on January 22, 1990, on the second page of that ownership report, it shows that Charles Knox is President of Center.

My question to you is was Charles Knox President of Center on that date?

A. No.

Q. Mr. Long, is that *your signature* on the second page of the ownership report?

A. Yes.

* * *

Tr. 997.

Q. Is that your signature on the second page of the ownership report [dated April 12, 1988], which is labeled Page 88?

A. Yes.

Q. Was Mr. Knox President of Center in April – on April 12, 1988?

A. No.

* * *

Tr. 998.

Q. Would you let me know when you're finished looking at that ownership report [dated May 23, 1987]?

A. Yes, I'm through.

Q. Mr. Long, on May 23, 1987, was Charles Knox President of the Center?

A. No.

Tr. 999.

14. In his testimony quoted above, Long misrepresented and lacked candor when he failed to disclose Knox's role in the preparation of Center's renewal application and ownership report. Long's attempt to "cover up incriminating information" about Knox's significant role in the renewal filings, as the ALJ correctly found, *see I.D.*, ¶ 53, was only a part of Center's attempt to create the false impression that Knox had withdrawn from his position as Center's President before the renewal filing, and that Center's board of directors had also decided late in 1989 to remove Knox. *Id.* at ¶ 98. Center responds that "there was some confusion as to exactly when Charles Knox ceased his participation with KUCB." Br. at 19-20. Center essentially urges that "lack of information" about Knox's convictions, and "uncertainty about his capacity within the organization by some officers" explains why "erroneous information appeared in Center's application for renewal." *Id.* p. 21.

15. Center's contention is contradicted by the record and especially Knox's reluctant admission that he prepared the renewal application and ownership report. Moreover, Center's own contemporaneous documents, *see* para. 9 above, and the inconsistent and contradictory testimony of Long, Knox, and Samad demonstrate that the ALJ was completely justified in finding that Center's witnesses attempted to conceal Knox's significant role in the preparation of the renewal filings, and attempted to create the false appearance that Knox had withdrawn from his position as Center's President prior to the filing of the renewal application in January of 1990.

16. With respect to the contradictory testimony, Long answered in response to another direct question

from Center's counsel about the last time that Dr. Knox was involved with the station: "I think it was around the early 80's." Tr. 889. On cross-examination, Long responded on three different occasions that he was: "not sure about the date." Tr. 994. However, after being shown the three ownership reports dated January 22, 1990, April 12, 1988, and May 23, 1987, which listed Charles Knox as Center's President. Long gave a flat "no" each time when asked if Knox was President at those times. *See* Tr. 997-999, reproduced at ¶ 13, above. Long's claim that Knox was not an officer at the time of the 1987 and 1988 ownership reports was impeached by Knox's own testimony that he was on the board from "1985, to resignation, in 1989." (Tr. 1397-1399) and Samad's testimony that, in late 1989, Knox was asked by the newly elected board to resign (Tr. 1119-1120; tr. 1150); *see also* Tr. 1135-1136.

17. The record supports the ALJ's additional finding that Knox "misrepresented the status of his resignation in order to avoid an adverse finding against Center with respect to Knox's conviction." *I.D.*, ¶ 98. The 1987, 1988, and 1990 ownership reports all listed Knox as Center's President, see para. 9 above. In his testimony, Knox first attempted to create the impression that it was Long who had listed his name in the January 1990 ownership report (*see* Tr. 1394-1395 and 1413-1414). However, he was finally forced to admit near the end of his cross-examination that the handwriting on the ownership form was his, and that he filled in the part of the ownership form listing the names and addresses of the officers including his own name. Tr. 1415-1416. Like the ALJ, we find an irreconcilable conflict between Knox's testimony that he attempted to resign and had been asked to resign prior to the filing

of the renewal application, and the Commission records, especially the January 1990 ownership report where Knox in his own handwriting identified himself as Center's President and revised his own address. *See Swan Creek*, 39 Fd. 3d [sic] at 1222-1223 ("Board could properly make a lack of candor determination . . . where, as here, an irremediable conflict appears between records submitted to the Commission and testimony").

18. In sum, reliable documentary evidence and other substantial evidence firmly undergird the ALJ's findings summarized in para. 4(a) – (d), above, and his conclusion that Center's false testimony establishes that "it does not have a propensity to deal honestly with the Commission. Rather, it has a propensity to deal falsely with the Commission, even under oath." *I.D.*, ¶ 103. Disposition of Center's renewal application is controlled by the Commission's holding in *Grenco*, 39 FCC 2d at 736-37, that:

> Complete candor from Commission licensees as to matters under investigation may be demanded and is expected. . . . While issues are designated to place the licensee on notice of the charges which he will be required to meet at the hearing, notice to a renewal applicant that he must testify truthfully and not conceal material information is superfluous. Taking the oath serves the purpose and no unfairness results in holding a renewal applicant to have knowingly assumed the risk of an adverse determination as to its character qualifications when a principal testifies falsely at the hearing. . . . [W]e cannot temporize with deliberate deception of the Commission. No matter how unblemished the reputation of the principal in the community, no one

is allowed "one bite" at the apple of deceit. (citation omitted).

19. Center faults the ALJ in its exceptions for failing to consider the Commission's public policies supporting minority-owned educational stations, *see* Br. at 17-19; but the Bureau correctly notes in reply, at 9-10, that the Commission's policies of fostering minority ownership have never "suggested that th[ese] polic[ies] excuse[ ] a licensee's misconduct." Moreover, it is now well-established that a noncommercial broadcast applicant's "proclivity to deal truthfully with the Commission is a bedrock prerequisite to a finding of basic character qualification to hold a license." *KQED, Inc.*, 3 FCC Rcd at 2826 ¶ 24; *see also Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1399, 1429-30 (1978) (accountability of noncommercial broadcast licensees).

20. A meritorious past broadcast record can not mitigate or offset Center's lack of candor, which is a serious breach of trust undermining the integrity of the Commission's processes. *See KQED*, 3 FCC Rcd at 2827 at ¶ 27; *Standard Broadcasting Inc.*, 7 FCC Rcd at 8577 n.29. In any event, Center's past broadcast record includes a serious violation of Section 73.561(a), and (f), which requires that its noncommercial station "operate at least 36 hours per week, consisting of at least 5 hours per day on at least 6 days per week" and if the licensee cannot adhere to its operating schedule, notification must be sent to the Commission. Here, the ALJ found that resolution of a Section 73.561 issue designated in this proceeding by the Commission provided another ground for denial of Center's renewal since for some two years Station KUCB-FM remained silent without Commission knowledge or

authorization in violation of 47 CFR § 73.561. *I.D.* at ¶¶ 104-107. Such a violation, on its face, is inconsistent with the general public interest, and the special needs of KUCB-FM's listening audience. The Bureau correctly notes at 12 n.7 of its reply that "Center's exceptions do not specifically dispute Center's violation of Section 73.561 of the Commission's Rules" and that "any objection thereto is waived. Section 1.277(a) of the Commission's Rules." Nevertheless, in light of Center's disqualification on the misrepresentation and lack of candor issue, we do not reach the question whether the Section 73.561 violation is sufficient, standing alone, to also warrant Center's disqualification.

21. Finally, at an earlier stage in this proceeding, Center requested that we find that the ALJ's prehearing procedural rulings indicated bias towards Center, mainly due to their harshness to that applicant. After reviewing Center's showing in light of the legal standards set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and other legal authorities, we denied Center's motions. *Center for Study and Application of Black Economic Development*, 7 FCC Rcd 3101 (Rev. Bd. 1992). In its exceptions, at 14-17, 23-26, Center renews its bias claims against the ALJ and Bureau Counsel. The exceptions are without merit. Initially, as a matter of law, we note that since our prior ruling on this matter, the United States Supreme Court, in *Liteky v. U.S.*, 114 S. Ct. 1147, 1157 (1994), reinforced the controlling legal principle of *Grinnell* that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." The Court observed that: "A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at

courtroom administration – remain immune." *Id.* Similarly, the United States Court of Appeals for the D.C. Circuit recently held that: "In an adjudicatory proceeding, recusal is required only where 'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of the particular case in advance of hearing it.' " *Metropolitan Council of NAACP Branches v. FCC*, No 93-1471. Slip Op. p. 18 (D.C. Cir. January 27, 1995). Center has not made the required showing of prejudgment.

22. Now that we have had an opportunity to review the factual record, we find that Center was not materially prejudiced by the ALJ's ruling of default, the primary gravamen underlying Center's claim of bias, which ruling technically precluded Center from presenting a direct case at the comparative hearing. We agree with the Bureau that Center did have an opportunity to present its case on the decisional misrepresentation issue. "Center offered all of the exhibits which it had exchanged before the Admissions Session and was not precluded from calling any witness on its list of witnesses because of the default ruling." Bureau Reply at 6. Our review of the record also confirms that the ALJ made a reasonable effort to accommodate the schedule of all counsel in this multi-party proceeding, *see Faith Center, Inc.*, 92 FCC 2d 1255 ¶¶ 15-16 (Rev. Bd. 1983), and that contrary to a contention by Center, Br. at 2, its chief counsel, Alfredo Parrish, had an opportunity to fully cross-examine Larry Nevilles, a former Station KUCB-FM employee and now a principal of Minority. *See* Tr. 656-717; 762-764. Lastly, Center has not made a showing of bias or prejudice on part of Bureau counsel because the Bureau participates in

such hearing as a party, 47 CFR 0.61(d), is not a decision-maker in this case. 47 CFR 1.1202(c), and was not shown to have prejudged any of the issues or was "impervious to contrary evidence." *Metropolitan Council of NAACP v. FCC, supra.*

ACORN'S FINANCES

23. *Background:* Non-commercial broadcast applicants, such as the applicants here, may certify that their financial qualifications are contingent upon later receipt of: (1) a grant from the National Telecommunications and Information Administration (NTIA); or (2) grants from charitable, educational, or government entities. *See* FCC Form 340, Section III – Financial Qualifications, Questions 1 and 2; *see also KQED, Inc.*, 5 FCC Rcd 1784, 1785 (1990). Question 3 of FCC Form 340, however, requires that applicants not relying upon the grant provisions above to check the "Yes" or "No" box in response to the following certification:

> The applicant certifies, except as noted above [in Questions 1 and 2] that sufficient liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without additional funds.

Compare CHM Broadcasting, 24 F.3d at 1455, financial certification by commercial broadcasters.

24. In their applications filed in January of 1990, both Acorn and Minority failed to certify that they were financially qualified as required by Question 3, above, both checking the "No" box. Within the period for

amending as of right prior to designation for hearing. Minority filed an amendment certifying that it was financially qualified. Minority's certification was based upon its application for a grant of $100,000 from NTIA, and on a $50,000 loan commitment letter from the East Des Moines National Bank, dated February 21, 1990. *See* Exhs. C and D to Minority's Opposition to Motion to Enlarge Issues filed August 27, 1991. Acorn, however, did not amend its financial certification prior to designation for hearing.

25. On August 29, 1991, Acorn filed an amendment which merely certified "yes" to Question 3. A subsequent amendment, filed September 20, 1991, indicated that: Acorn had entered into an agreement with Affiliated Media Foundation Movement (AMFM), whereby the latter agreed to secure Acorn's financing: that on July 2, 1990, AMFM had received a commitment letter from "U.S. Trust for a loan for up to $700,000 for construction and initial operation of a radio station in Des Moines, Iowa"; and that Acorn needed "a total of $155,355" to finance its proposed station. Petition to Amend at 2, Exh. A. When the ALJ was notified by the Mass Media Bureau's pleadings that Acorn had failed to certify its finances prior to designation for hearing and that Acorn's reliance on the UST loan commitment letter raised substantial questions of fact, the ALJ added the following issue against Acorn:

> To determine whether [Acorn] has reasonable assurance of funds to construct and operate Channel 207C; whether [Acorn] is financially qualified; and whether [Acorn] is qualified to

> receive a Commission [construction] permit for the Des Moines community.

Tr. 72-73; *see also Order*, FCC 91M-3004, released October 3, 1991: *I.D.*, ¶ 4. Both the burden of proceeding and the ultimate burden of proof were placed on Acorn. *Id.* ¶¶ 4, 76, 121-122.

26. At hearing, Acorn submitted a letter from AMFM dated December 27, 1989, which states in pertinent part:

> This letter will confirm the willingness of [AMFM] to secure funding for [Acorn]. We are able to make a commitment of $730,000 in the form of unsecured loans.

Id. at ¶ 79. The parties do not dispute the ALJ's finding that AMFM was only acting as an intermediary. Acorn ultimately relied on the UST letter to AMFM dated July 2, 1990, which recites in part:

> This letter states the conditional commitment of our investment management clients to loan up to $700,000 to assist AMFM in the financing for construction and initial operation of a radio station licensed to Des Moines, Iowa. Their willingness to do so is subject to the following conditions: . . .
>
> (2) All reasonable and ordinary credit criteria of [UST] are met at such time as [Acorn] (a) has received the permit to construct said station and (b) requests from our client via [UST] a formal and unconditional lending commitment; and,
>
> (3) [UST] receives, once the above conditions have been met, the written agreement to the terms of the loan from each and all of our

> investment management clients participating in the loan. . . . The precise terms of security of the loan also will be determined at the time of the unconditional loan commitment.

Id. at ¶ 80. The letter concludes:

> [UST] is personally and favorably acquainted with [AMFM] and we would be relying on your commitment to continued participation in the venture and *management of the radio station* as a part of the loan application.

Id. at ¶ 82. (Emphasis added).

27. Acorn's President Pauline Green, who had signed the financial certification, on August 29, 1991, did not offer any direct testimony regarding the financial issue. On cross-examination, she stated that Acorn had contracted with AMFM to secure financing for Acorn but did not submit any financial statement to AMFM. *I.D.*, at ¶¶ 78-79. Green also testified that Acorn's budget estimate was based upon AMFM's expertise and experience with other stations AMFM operates. *Id.* ¶ 86. After reviewing the relevant evidence, the ALJ found that "the estimate of $700,000 was based on raw speculation and lacked any foundation in reasonable fact" and that the mistake was attributable to AMFM because:

> . . . Moody and Rathke [UST and AMFM principals] testified that in actually the likely amount of the loan would be $150,000. (Moody, Tr. 518, Rathke, Tr. 548, 561.) Mr. Rathke surmised that the $700,000 figure was a mistake on the part of UST in using another unrelated project as the basis for the estimated costs because the $700,000 estimate clearly was excessive for Acorn's needs. (Rathke, Tr. 550, 551). However,

> since UST was relying on AMFM for the project's management, it is more likely that the mistake was AMFM's. In fact, on December 27, 1989, AMFM was committing to secure $730,000 and on July 2, 1990, UST was referring to a conditional loan commitment of $700,000.

Id. at ¶ 87.

28. Acorn's proposal to finance its station "through a UST commitment letter to a third party, AMFM," was found by the ALJ to be deficient as a matter of fact for several reasons. Initially, he pointed to "a fundamental error" that both the AMFM and the UST letters were based on "an erroneous assumption that Acorn would require $700,000 to construct and operate" the proposed station, whereas "the true estimate would have been approximately $150,000." *Id.* at ¶ 123. The Des Moines radio proposal had apparently been confused by AMFM with an unrelated and more expensive TV proposal. *Id.* This fatal factual error in UST's letter, the ALJ found, occurred because Acorn was not consulted by UST, there was no relationship between Acorn and UST, and therefore, there was no meeting of the minds on a true estimate of costs. *Id.* Moreover, he found several specific conditions in the letter from UST to AMFM that "neutralize any commitment": the UST "conditional commitment" would provide funding only so long as AMFM continues to be involved in the management of Acorn's "radio station" even though AMFM is not a party to the application; UST must first obtain prior approval from potential investors and there is no evidence that any investor has seen Acorn's financial statement or a plan of operations which discloses experience of operating personnel and a

feasibility of performance; and not one of the potential investors has expressed a willingness to participate. Accordingly, the ALJ concluded that the UST/AMFM letters were "meaningless" and "ephemeral" so that no reasonable applicant could rely upon them to establish reasonable assurance. *Id.* at ¶ 124.

29. *Discussion.* A broadcast applicant must have reasonable assurance "before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing." *Northampton Media Associates,* 4 FCC Rcd 5517, 5519 (1989). Whether an applicant has a reasonable basis to certify turns on "an objective inquiry" rather than the applicant's subjective intent, and probative evidence must be adduced at the hearing. *See Aspen FM, Inc.,* 5 FCC Rcd 3196, 3198 (Rev. Bd. 1990), *review denied,* 6 FCC Rcd 1602 (1991). Commission precedent also requires that loan commitment letters demonstrate more than a generalized "interest" to make a loan. *Capital City Community Interests, Inc.,* 2 FCC Rcd 1984, 1986 (Rev. Bd. 1987). A valid commitment letter need not establish "a legally binding commitment". *Multi-state Communications, Inc. v. FCC,* 590 F.2d 1117, 1119 (D.C. Cir. 1978), but it must establish a "present firm intention to make a loan, future conditions permitting." *Merrimack Valley Broadcasting, Inc.,* 82 FCC 2d 166, 167 (1980).

30. Here, Acorn's certification that "sufficient funds are available from committed sources to construct and operate the requested facilities for three months without additional funds". FCC Form 340, Question 3, was based on the loan commitment letter from UST to AMFM. As the ALJ correctly concluded, however, it was apparent on

the face of the documents before Green when she certified that Acorn did not have reasonable assurance. First, Acorn needed approximately $150,000, but the AMFM/UST contingent commitment letters were based on the erroneous assumption that $700,000 was needed; thus, we agree with the ALJ that there was no meeting of the minds on the true estimate of Acorn's financial need. Second, and even more fatal to Acorn's financial certification, was the fact that on its face the UST "conditional commitment" letter was contingent upon AMFM's "continued participation in the venture and management of the radio station as a part of the loan application." *See* ¶ 26 above. Green had to know at the time she certified that this condition was impossible to accomplish because Acorn's application, even as amended, did not propose AMFM in a management role. AMFM had been retained to provide technical assistance regarding engineering, financial, legal, and other matters relative to Acorn's application. *I.D.*, at ¶ 78. According to its application. Acorn intends to own, manage, and operate the station. Finally, UST's letter indicates on its face that before UST can make a loan the applicant must first obtain the approval from participating potential investors, and not one such investor has expressed a willingness to participate. Reinforcing the obstacle imposed by this condition is the testimony of an AMFM principal that AMFM had previously never arranged a loan directly from UST; instead, it had obtained loans from clients that were part of the portfolio managed by UST. Tr. 551. An objective review of the documents on which Green based her certification supports the ALJ conclusion that no reasonable applicant could have certified based on those documents.

CHM Broadcasting, 24 F.3d at 1457-1458 ("reliance on *objective* information" for financial certification).

31. Acorn's principal contention is that the ALJ failed to recognize that the traditional lending criteria may not be relevant in the noncommercial context. It argues for "an expanded notion of what actually constitutes reasonable assurance.' " Br. at 4. Acorn points out that UST and its clients were responsible for "making socially and ethically responsible investments" and that "financial information might not be sought because the investment concern might be solely about the social benefit of that investment.' " *Id.* Had the ALJ applied these "criteria." Acorn argues, it would have been found to have reasonable assurance of financing. *Id.* at 5. This argument is of no avail. In essence, we agree with the Bureau's reply that only if Acorn had relied on an NTIA, charitable, educational or other governmental grant would a different noncommercial standard have been applicable. *See* ¶ 23 above; *KQED, supra*, 5 FCC Rcd at 1585. On the record of this case, the Bureau points out that "it is irrelevant that the potential investors are interested in socially and ethically responsible investments, as Acorn insists. There simply are no investors upon which Acorn could reasonably rely." Bureau Reply at 15-16.

32. Acorn's final contention regarding finances (Br. 11-12) is that the ALJ was "arbitrary and capricious" and acted contrary to administrative "due process and equal protection of the laws" when he added a financial qualifications issue against Acorn but refused to specify a financial issue against Minority. Acorn alleges that Minority's showing contained "comparable contingencies" as those in Acorn's letters. *Id.* at 12. Acorn and

Minority were not similarly situated procedurally. Acorn failed to financially certify prior to designation for hearing and the Commission's processing staff inadvertently did not designate a financial issue against Acorn. Minority, on the other hand, amended its application as of right prior to designation for hearing certifying that it was financially qualified. Thus, Acorn had to make a *prima facie* showing that a financial issue should be designated against Minority, which it failed to do. *See* 47 CFR § 1.229, and Bureau Reply at 17. Our review of the documents before the ALJ, *see* ¶ 24, above, reveals that, as a matter of fact. Acorn and Minority were not similarly situated. Minority's financial certification was based upon an NTIA grant explicitly contemplated by Commission policy, *see KQED, supra.* Acorn did not rely upon such a grant. Minority's certification also relied on a bank letter, but a review of that letter indicates that it did not contain any of the fatal contingencies present in Acorn's letters. We therefore affirm the ALJ's conclusion that substantial evidence in the record establishes that Minority is the only qualified applicant to receive a construction permit for a noncommercial FM station in Des Moines, Iowa. *I.D.*, at ¶¶ 132-135.

33. ACCORDINGLY, IT IS ORDERED. That the application of Minority Communications, Inc. for a construction permit for a new FM station (File No. BPED-900116MA) IS GRANTED; the license renewal application (File No. BRED-900131UA) of Center for Study and Application of Black Economic Development for Station KUCB-FM. Des Moines, Iowa IS DENIED; the application of Iowa Acorn Broadcasting Corporation for a construction permit for a new FM Station (File No.

BPED-900102MB) IS DENIED; and Center for Study and Application of Black Economic Development IS AUTHORIZED to continue operation of Station KUCB-FM until 12:01 A.M., on the forty-fifth (45) day from the release date of this *Decision* to enable the licensee to conclude the station's affairs, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or Commission.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman Review Board

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1066 **September Term, 1997**

Iowa Acorn Broadcasting Corporation,

Appellant

v.

Federal Communications Commission,

Appellee

Center for Study and Application of Black Economic Development and Minority Communications Inc.,
Intervenors

Consolidated with 96-1072

BEFORE: Silberman, Randolph and Garland, Circuit Judges

ORDER

(Filed Dec. 16, 1997)

Upon consideration of the petition for rehearing of appellant in No. 96-1072 filed December 5, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk